

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

KIRK EBERLE,	:	Case No. C1-01-614
	:	
Petitioner,	:	
	:	
v.	:	Judge Weber
	:	
ANTHONY BRIGANO, Warden,	:	Magistrate Judge Hogan
	:	
Respondent.	:	

**RESPONSE TO PETITIONER’S OBJECTIONS**

**A. Petitioner’s objection with respect to the procedural default is without merit.**

Curiously, Petitioner’s lengthy objection to the Magistrate Judge’s conclusion that a procedural dismissal pursuant to Ohio App. R. 26(B) is an adequate and independent basis for dismissal fails to cite the case of *Monzo v. Edwards*, 281 F.3d 568. In *Monzo*, the Sixth Circuit held definitively that dismissals pursuant to Ohio App. R. 26(B) are in fact “adequate and independent.” *Monzo*, 281 F.3d at 577-78. Petitioner’s claims to the contrary are unavailing.

**B. Petitioner’s objection on the merits is unavailing.**

Petitioner’s objection on the merits of his sole claim does nothing more than restate arguments that the Magistrate has already rejected. Because the Magistrate Judge’s decision on the merits was correct, it should be adopted and this case should be dismissed.

**C. Respondent requests a ruling on his statute of limitations defense.**

Finally, Respondent respectfully requests that the Court address the statute of limitations argument made in the Return of Writ. The Magistrate Judge declined to address the defense, based upon the Sixth Circuit's unpublished decision in *Lambert v. Warden*, 2003 WL 22071466 (6<sup>th</sup> Cir. Sept. 2, 2003). However, only published opinions have the force of law, and on the issue presented, *Bronaugh v. Ohio*, 235 F.3d 280 (6<sup>th</sup> Cir. 2000) is still controlling. *Bronaugh* holds that an application filed pursuant to Ohio App. R. 26(B) only tolls the statute of limitations, and does not restart it. *Id.* at 285-86. Because *Bronaugh* is the controlling law on this subject, it must be followed. Consequently, Petitioner's habeas filing is quite untimely, and should be dismissed pursuant to 28 U.S.C. §2244(d).

Respectfully submitted,

BETTY D. MONTGOMERY  
Attorney General

s/ M. Scott Criss  
M. SCOTT CRISS (0068105)  
Assistant Attorney General  
Corrections Litigation Section  
140 E. Town Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 644-7233

Trial Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Response to Petitioner's Objections* was filed electronically on January 2, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/ M. Scott Criss  
M. SCOTT CRISS  
Assistant Attorney General